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IN THE
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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January 30, 2001

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AMENDED CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states the following. Time Warner Entertainment Company, L.P., is a Delaware limited partnership. The general partners in Time Warner Entertainment Company, L.P., each are directly or indirectly wholly owned by AOL Time Warner Inc., a publicly held company. An ownership interest of more than 10 percent in Time Warner Entertainment Company, L.P., is held (directly or indirectly) by AT&T Corp., a publicly held company.

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REPLY BRIEF FOR PETITIONER

The Government's Brief in Opposition only confirms the need for certiorari in this case.

1. The Government does not deny that the subscriber-limits provision (47 U.S.C. § 533(f)(1)(A)) and the channel-occupancy provision (*id.* § 533(f)(1)(B)) constitute direct suppressions of speech. Nor does the Government deny that Congress suppressed the speech of cable operators in order to promote what it believed would be a better, more "diverse," mix of programming. The Government also does not deny that these measures would therefore trigger strict scrutiny (either as direct abridgments of speech or as content-based prohibitions on speech, or both) if they were made applicable to print media. Thus, the Government effectively concedes

that this case presents the question whether settled First Amendment principles are inapplicable in the cable medium.

On the merits of that question, the Government contends that cable speech should be subject to special First Amendment rules because "[a] cable operator, unlike speakers in other media, can . . . silence the voice of competing speakers with a mere flick of the switch." Br. in Opp. 11 (internal quotation marks omitted). But there is no "cable exception" to the First Amendment. This Court's decision in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*"), on which the Government relies, in fact *rejected* the proposition that regulation of cable was automatically subject to no more than intermediate First Amendment scrutiny. *Id.* at 637-40.

Although *Turner I* upheld must-carry laws, it did not involve content-based "must-not-carry" laws like the subscriber-limits and channel-occupancy provisions. Whereas the restrictions in *Turner I* burdened cable operators' speech only indirectly (by requiring carriage of broadcast stations, many of which would have been carried in any event), the restrictions here at issue directly cap the quantum of speech that a cable operator may utter. And whereas the purpose of the restrictions in *Turner I* was merely to secure a supply of programming for television viewers without cable (by safeguarding the commercial viability of free over-the-air broadcasting), the purpose of the restrictions challenged here is to "improve" upon the mix of speech available within the cable medium. This Court took great pains in *Turner I* to stress that the must-carry rules had neither a direct impact on cable operators' speech nor a content-based purpose, either of which alone would have been sufficient to trigger strict scrutiny. *See* Pet. 16-19. Thus, the Government is simply mistaken in reading *Turner I* as justifying any regulation of cable speech at all, no matter how direct or content-based.

Turner I confirms — it does not reject — the basic notion that a burden on speech triggers strict scrutiny if it either is a direct restriction or has a content-based purpose. Both conditions are met here.

The single paragraph in the Government's brief addressing Congress's diversity-enhancement purpose (Br. in Opp. 10) does not even engage our argument. Of course the Government may seek to increase speech diversity — say, by subsidizing speakers that it deems particularly worthy. But this Court has never permitted the Government to *suppress* speech in the name of increasing diversity. *See* Pet. 13-15. Here, Congress acted out of "concern" that cable operators "will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both." S. Rep. No. 92, 102d Cong., 1st Sess. 32 (1991) ("S. Rep."). As the court of appeals found, Congress suppressed cable operator speech because it feared "that cable operators would impose their own biases upon the information they disseminate." Pet. App. 9a. The First Amendment withdraws from the Government the power to ban speech in order to fine-tune the mix of expression according to the Government's liking and to prohibit speakers from speaking according to their own biases. It is nothing short of startling to find that the Government nevertheless contends that such a power exists in the cable medium.

The Government's claim that *Turner I* somehow authorized the suppression of cable speech in order to promote "diversity" (Br. in Opp. 10) has no basis whatsoever. To the contrary, this Court there warned that any law "designed to ensure that the . . . speech of [some] not drown out the speech of others" would necessarily be "concerned with the communicative impact of the regulated speech" and would therefore trigger strict scrutiny. 512 U.S. at 658; *see* Pet. 19.

2. The Government reads *Turner I* as permanently imposing a maximum ceiling of intermediate scrutiny in the cable medium until Congress or the FCC chooses to revisit the issue. Br. in Opp. 12. According to the Government, the legislature or the agency, not the judiciary, "is the appropriate body" to determine whether post-1992 marketplace changes and technological developments, such as the emergence of the Internet and direct broadcast satellites, alter the constitutional analysis. *Id.*

Quite apart from the Government's misreading of *Turner I*, it is fundamental that the courts, not the political branches, bear ultimate responsibility for determining whether statutory enactments comport with the Constitution. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *see also Turner I*, 512 U.S. at 666 (plurality). Thus, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505-06 (1996) (plurality), this Court rejected the expert views of a state liquor control agency; in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487-90 (1995), the Court rejected the views of the U.S. Bureau of Alcohol, Tobacco and Firearms; and in *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136, 142-44 (1994), and *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993), the Court rejected the views of expert state accountancy boards.

Moreover, the very fluidity and dynamism of the cable medium militate strongly against the Government's view that *Turner I* meant to settle for all time whether and how special physical or economic characteristics of cable affect the application of strict First Amendment scrutiny. This Court should grant review to reaffirm the principle that a statute's constitutionality must be judicially assessed in light of current circumstances, for "[a] statute valid when enacted may

become invalid by change in the conditions to which it is applied." *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935).

3. Certiorari is also needed to clarify and reaffirm basic principles of intermediate scrutiny. The Government cannot identify any real-world evidence that the subscriber-limits and channel-occupancy provisions are in fact needed. That is, the Government cannot show that large cable operators have actually refused to carry unaffiliated new programming services -- let alone that cable operators have done so to such a degree as to justify serious restrictions on their speech. Instead, the Government relies solely on speculation that such risks might exist because of vertical integration or horizontal concentration in cable markets -- despite the more narrowly tailored remedies already provided by the antitrust laws and the 1992 Cable Act's anti-discrimination provision. 47 U.S.C. § 536(a)(3).

Such conjecture cannot justify a prophylactic ban on speech, as is borne out by the very "evidence" on which the Government relies. For example, the Government points to a statement in the House report that "'the size of certain [cable operators] *could* enable them to extract concessions from programmers.'" Br. in Opp. 14 (quoting H.R. Rep. No. 628, 102d Cong., 2d Sess. 42-43 (1992) ("H.R. Rep.")) (emphasis added). Not only is the statement wholly speculative, but the Government fails to mention that the same House report emphasizes, only two sentences later, that vertical integration has pro-competitive benefits and can stimulate new programming services:

> [P]ermitting system operators an equity position in programming services may be *an efficient way of financing new service providers* and compensating cable operators for assuming some of the risk associated with the launch of a new service.

> The Committee also is aware that consolidation in the cable industry has brought some *benefits to consumers*. The Committee believes that the growth of [cable operators] in the cable industry has produced some efficiencies in administration, distribution, and procurement of programming. Further, programmers' transaction costs also may have been reduced in the absence of the need for negotiation with each of thousands of local cable systems throughout the country. Moreover, large [cable operators], able to take risks that a small operator would not, can provide a sufficient number of subscribers to *encourage new programming entry*.

H.R. Rep. at 43 (emphases added). The Senate report cited by the Government similarly recognizes that "there are legitimate reasons for integration" and that there are "efficiencies associated with the increased size of cable companies." S. Rep. at 33-34.

Such ambiguous evidence hardly provides sufficient support for the Government's speculation that the subscriber-limits and channel-occupancy provisions are narrowly tailored means of addressing an actual governmental interest. *Edenfield*, 507 U.S. at 768. The proper test under the First Amendment is not whether a government interest is imaginable. The Government's burden cannot be satisfied by mere "speculation or conjecture." *44 Liquormart*, 517 U.S. at 507 (plurality opinion) (internal quotation marks omitted). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Edenfield*, 507 U.S. at 777 (internal quotation marks omitted). For example, this Court has held that a blanket ban on solicitation letters is invalid where individual letters can be reviewed on a case-by-case basis. *Shapero v. Kentucky Bar*

Ass'n, 486 U.S. 466, 478 (1988). A ban on liquor advertising is invalid where "educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective." *44 Liquormart*, 517 U.S. at 507 (plurality opinion).

Nor can the Government derive support from *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*"). There, this Court rejected the suggestion that the antitrust laws or an administrative-complaint mechanism would constitute a less restrictive yet equally effective alternative to must-carry. *Id.* at 222-23. But the Court reached that conclusion only after a remand and on the basis of a vast evidentiary record. *Id.* at 223. Nothing remotely comparable exists here.

4. The Government contends that the facial nature of petitioner's challenge carries a special burden. Br. in Opp. 8. But, because the subscriber-limits and channel-occupancy provisions are direct, content-based restrictions on the quantity of cable operator speech and cannot pass muster under any level of First Amendment scrutiny, there is "no set of circumstances . . . under which [they] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The statutory provisions would be facially invalid even if it were possible to conceive of governmental interests that could be served by a properly drawn replacement law.* If anything,

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* *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 392, 396 (1992) (content-based hate-crimes law was facially void even though a properly drawn statute would have been able to punish the cross burning at issue); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988) (plaintiff may prevail in facial attack if she shows that "every application of the statute create[s] an impermissible risk of suppression of ideas") (internal quotation marks omitted); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (rule purporting to ban all "First Amendment activities" in the central terminal at Los Angeles

any administrative latitude on the part of the FCC in the implementation of the statute constitutes a separate constitutional defect. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988) ("the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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International Airport was facially void even though *some* speech within its ambit could permissibly have been regulated by a narrower law).